Written Statement
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Committee on the Judiciary
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I. INTRODUCTION

Chairman Jordan, ranking member Nadler, members of the Select Subcommittee, my name is Jonathan Turley, and I am a law professor at George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.[1] It is an honor to appear before you today to discuss the weaponization of the federal government.

For the purposes of background, I come to this subject as someone who has written,[2] litigated,[3] and testified[4] in the areas of congressional oversight and the First

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[1] I appear today on my own behalf, and my views do not reflect those of my law school or the media organizations that feature my legal analysis.

[2] In addition to a blog with a focus on First Amendment issues (www.jonathanturley.org), I have written on First Amendment issues as an academic for decades. *See, e.g.,* Jonathan Turley, *The Unfinished Masterpiece: Speech Compulsion and the Evolving Jurisprudence of Religious Speech* 82 MD L. REV. (forthcoming 2023); Jonathan Turley, *The Right to Rage in American Political Discourse*, GEO. J.L. & PUB. POL'Y (forthcoming 2023); Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y 571 (2022); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015); Jonathan Turley, *Registering Publicus: The Supreme Court and Right to Anonymity*, 2002 SUP. CT. REV. 57-83.

[3] *See, e.g.,* Eugene Volokh, *The Sisters Wives Case and the Criminal Prosecution of Polygamy*, WASH. POST, Aug. 28, 2015 (discussing challenge on religious, speech, and associational rights); Jonathan Turley, *Thanks to the Sisters Wives Litigation, We have One Less Morality Law*, WASH. POST, Dec. 12, 2013.

[4] *See, e.g.*, *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack*: *Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power*: *Hearing Before H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Commc'n & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. (2021) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *The Right of The People Peacefully to Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *Respect for Law Enforcement and the Rule of Law*: *Hearing Before the Commission on Law Enforcement and the Administration of Justice*,

Amendment for decades. I have also represented the United States House of Representatives in litigation.[5] I am admittedly someone who has been called a free speech absolutist. While I do accept some limits on free speech, it is certainly true that I tend to oppose most criminalization, censorship, and regulation of speech. My testimony today obviously reflects that past work, but I hope to offer a fair understanding of the governing constitutional provisions, case law, and standards that bear on this question. It is my sincere hope that there is room for bipartisan agreement on exposing the past government involvement in censorship systems implemented by social media companies. There are legitimate disagreements on how Congress should address the role of the government in such censorship. The first step, however, is to fully understand the role played in prior years and to address the deep-seated doubts of many Americans concerning the actions of the FBI and other agencies.

In the 1924 English case of *Rex v. Sussex*, a conviction was overturned, not because there was a clear injustice, but because there could be doubt in the minds of some whether justice was done. Lord Chief Justice Gordon Hewart famously wrote: "It is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done."[6] The Department of Justice has long recognized the same demand applies to its work. Key standards reflect this same principle. For example, the decision to appoint a special counsel is often made by an Attorney General despite the belief that the department could conduct an investigation fairly. However, these appointments are often made to assure the public that justice will be meted out in an independent and consistent manner. Judges also follow this principle for their own recusal. A judge will choose removal when "impartiality might reasonably be questioned."[7] These rules reflect the fact that a justice system can only remain credible and viable if it is generally accepted. No legal system can guarantee total detection and accountability. Society relies on citizens voluntarily complying with rules and accepting the results of the judicial system. That requires fealty to the system, which requires faith in its results. That is why the current environment is so damaging for a country based on the rule of law.

Polls indicate a deepening distrust of the government and the FBI in particular. A fifth of Americans now view the government as the greatest threat facing the nation.[8] Only 40% of Americans trust the FBI "most of the time."[9] Fifty percent of Americans only trust the FBI "some of the time" or "hardly ever." The latter group accounts for 20%

(2020) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *The Media and The Publication of Classified Information: Hearing Before the H. Select Comm. on Intelligence*, 109th Cong. (2006) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

5 *See* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016), https://casetext.com/case/us-house-of-representatives-v-capacity-1.

6 Rex v. Sussex Justices, 1 K.B. 256, 259 (1924).

7 28 U.S. CODE § 455.

8 Megan Brenan, *More Cite Gov't as Top U.S. Problem; Inflation Ranks Second*, GALLUP, Jan. 30, 2023, https://news.gallup.com/poll/468983/cite-gov-top-problem-inflation-ranks-second.aspx.

9 Craig Helmstetter, *Poll: Trust in the FBI Higher Among Democrats*, APMRESEARCHLAB, Jan. 4, 2023, https://www.apmresearchlab.org/motn-fbi-trust-jan-2023?rq=fbi.

of those polled who rarely trust the FBI. There is a sharp difference between Democrats on one side, and both Republicans and Independents on the other. Democrats are more likely today to trust the FBI, a significant change politically from the 1960s. These polls are consistent on roughly half of the country expressing distrust in the FBI.[10] What is truly shocking is that 53% of those asked in one poll agreed with the statement that the FBI was acting like "Biden's Gestapo."[11] That criticism of the FBI by Roger Stone is deeply offensive to many inside and outside the FBI. Agents of the FBI put themselves in harm's way every day to protect citizens from harm. However, it is dangerous to ignore these polls and the harm that this distrust in government does to our democratic system. Even if you discount any given poll as skewing left or right, these polls consistently show a widespread lack of faith in the FBI and the work of our government.

The Twitter Files raise serious questions of whether the United States government is now a partner in what may be the largest censorship system in our history. The involvement cuts across the Executive Branch, with confirmed coordination with agencies ranging from the CDC to the CIA. Even based on our limited knowledge, the size of this censorship system is breathtaking, and we only know of a fraction of its operations through the Twitter Files. Twitter has 450 million active users[12] but it is still only ranked 15th in the number of users, after companies such as Facebook, Instagram, TikTok, Snapchat, and Pinterest.[13] The assumption is that the government censorship program dovetailed with these other companies, which continue to refuse to share past communications or work with the government. Assuming that these efforts extended to these larger platforms, it is a government-supported censorship system that is unparalleled in history.

Regardless of how one comes out on the constitutional ramifications of the government's role in the censorship system, there should not be debate over the dangers that it presents to our democracy. The United States government may be outsourcing censorship, but the impact is still inimical to free speech values that define our country.

II. EXECUTIVE ABUSE AND CONGRESSIONAL OVERSIGHT

Since my testimony is focused on First Amendment concerns, I will not dwell upon the other matters that should be considered by the select subcommittee. I felt that the question of censorship warranted the close and comprehensive attention of one of the witnesses today. I did want, however, to briefly discuss the myriad of issues that fall within the province of this Committee in relation to the FBI.

The growing distrust of our government is fueled by the concern of some citizens that the Justice Department and the FBI have lost clear separation from the political influence and the agenda of the White House. Similar concerns were raised during the Trump Administration. I supported congressional inquiries previously in the Trump

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[10] *See, e.g., 'Biden's Gestapo'? Trump Raid Hurts Voter Trust in FBI*, RASMUSSEN REPORTS, August 18, 2022, https://www.rasmussenreports.com/public_content/politics/public_surveys/biden_s_gestapo_trump_raid_hurts_voter_trust_in_fbi.

[11] *Id.*

[12] *Twitter Revenue and User Statistics*, BUSINESS OF APPS, Jan. 31, 2023, https://www.businessofapps.com/data/twitter-statistics/.

[13] *Most Popular Social Networks*, STATISTA, https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

Administration and support them now in the Biden Administration. I am not convinced that some controversies establish political bias as opposed to questionable judgment on the part of the FBI. For example, the decision to allow uncleared counsel to conduct searches for classified material related to President Biden was a mistake in my view. Since the President was offering full access and cooperation, those searches should have been carried out (as they were most recently at the Rehoboth Beach residence) by FBI agents. However, as I have stated previously, the FBI showed the same willingness to use private counsel to collect material in the initial stages of Mar-a-Lago. In both cases, the FBI may have not viewed the controversies as likely criminal matters as opposed to collection efforts. Moreover, some controversies may reflect changes in the priorities of this President. Administrations are allowed to prioritize areas for enforcement. That has long been a matter of tension with Congress in past administrations in areas ranging from immigration to environmental regulation to criminal enforcement. While the Justice Department has a long tradition of independence from the White House in carrying out investigations and prosecutions, it is still a part of the Executive Branch, subject to the enforcement priorities set by the President.

In addressing these controversies, the subcommittee will also have to distinguish between problems of personnel and problems of policy or practices. Some questions of bias can be traced to personnel. We have seen FBI agents, like Peter Strzok, removed or fired in recent years for their open political bias. The belated efforts to remove such officials is a concern, but their conduct may not show a systemic bias in the bureau. However, a far more serious concern is why the bureau continued to push the Russian collusion investigation despite ample and early evidence refuting claims by Christopher Steele and others. Recently, the mainstream media has begun to acknowledge that it committed the same failure of objectivity and judgment in pushing these allegations. Famed *Washington Post* journalist Bob Woodward recently criticized the *Washington Post* and other media for ignoring obvious signs that the Russian collusion allegations in the Steele Dossier were unsupported and pushed by the Clinton campaign. He said that reporters would not heed warnings from him and others. They were intent on pushing the collusion story and would not be deterred.[14] The respected *Columbia Journalism Review* issued a recent scathing report on the failures of the media in pushing the Russian collusion allegations without such support. It found that journalists were abandoning core principles of their profession due to the bias against Donald Trump.[15] The responsibility of the media in spreading debunked allegations is a serious matter, particularly given the funding of the dossier by the Clinton campaign.

The belated recognition in the media that it failed in pushing the Russian collusion allegations is serious. However, it is a far more serious problem when FBI agents engage in the same lack of objectivity and judgment. Unlike reporters, these agents have the ability to use government authority against targeted individuals and groups. We now know that the FBI was warned early in this process that the Steele

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[14] Emily Crane, *Bob Woodward Says WaPo Reporters Ignored his Steele Dossier Warnings*, NY POST, Feb. 1, 2023.

[15] *See generally* Jeff Gerth, *The Press Versus the President, Part One*, THE COLUMBIA JOURNALISM REVIEW, January 30, 2023, https://www.cjr.org/special_report/trumped-up-press-versus-president-part-1.php.

Dossier might be Russian disinformation. Intelligence sources also directly contradicted the accounts and the credibility of key sources. Yet, the bureau seemed unwilling to alter its unrelenting pursuit in the matter. That is not simply a personnel matter, but rather, reflects a failure of failsafe measures to catch bias and willful blindness in such cases. It also reflects the lack of effective avenues for rank-and-file agents to raise potential concerns over bias – and policies to reinforce the use of those avenues. The lack of credible evidence of Russian collusion was flagged early both inside and outside the FBI. For example, the FBI Washington Field Office concluded that Flynn "was no longer a viable candidate as part of the larger Crossfire Hurricane umbrella case."[16] We know now that high ranking officials decided that the absence of any crime would not be allowed to terminate the investigation. FBI special agent Peter Strzok instructed the FBI case manager to keep the investigation open and then sent a celebratory text to FBI lawyer Lisa Page, who responded, "Phew. But yeah that's amazing that he is still open."[17] The FBI is a highly hierarchical organization where the chain of command is followed on such questions. It is culturally and professionally difficult for an agent to raise concerns to such orders outside of an investigatory team. There needs to be a better system that not only allows for greater review of these investigations but meaningful avenues for agents to raise concerns that individuals are being targeted without sufficient cause. When the Washington Field Office moved to terminate its investigation, it had already performed a full and unbiased evaluation of the evidence. Yet, a couple of FBI officials were able to keep the investigation going on what now looks like a hope and a prayer rather than a crime and evidence.[18] Again, raising these concerns is not confirming the underlying allegations. Rather, they are concerns that should be taken seriously by this body and the Justice Department. A sizable percentage of our country believes that there was disparate treatment in the handling of these investigations. The Congress is the body constitutionally invested with the oversight authority to address those concerns.

Another area of concern has been the push by many in Congress to get the Justice Department to prioritize certain ideologies in opening investigations. As I stated in recent testimony,[19] such use of ideology as a determinative threshold criteria can have dangerous implications for free speech in the United States.[20] The Justice Department

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[16] Geoff Earle, *Mike Flynn was Cleared by FBI of Being Russian Asset*, Daily Mail, Apr. 30, 2020.

[17] Jonathan Turley, *New Documents Show Strzok Countermanded Closure of Flynn Case*, Res Ipsa Blog, May 1, 2020.

[18] There is also concern over the alleged different treatment given to cases like the Biden influence peddling allegations and the Hunter Biden computer controversy. Where the FBI showed an unrelenting commitment to proving Russian collusion, many see a comparative disinterest in pursuing allegations related to the Biden family, including allegations of foreign influence (including foreign intelligence figures) in deals worth millions. Likewise, there have been leaks in critical investigations that seemed calculated for political impact. The Mar-a-Lago raid was followed by a torrent of leaks associated with the government.

[19] *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack*: *Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School).

[20] *See also* Jonathan Turley, *The Right to Rage in American Political Discourse*, GEO. J.L. & PUB. POL'Y (forthcoming 2023).

and related agencies already have a robust investigative system that targets violent extremists in the United States, and that system has been significantly expanded in recent years.[21] The underlying cases all pertain to extremist violence and have been prioritized by the government based on the severity and immediacy of the risk to the public. However, the use of ideology can become a slippery slope toward criminalization of speech if used as a threshold determinative factor. It can also invite political influence over such cases if certain groups, like pro-life organizations or parental groups for educational reform, are given a priority for investigation.

I have not seen conclusive evidence on these questions that establishes systemic bias in some of these areas. Indeed, I will continue to assume that the Justice Department and FBI acted without a political agenda, even when I disagree with their actual decisions. However, there is nothing more corrosive and destructive to a legal system than a belief that law enforcement is compromised. The only hope in restoring public faith in the department is to assure the public that these questions have been fully explored.

III. THE TWITTER FILES AND CENSORSHIP BY SURROGATE

It is a common refrain among many supporters of corporate censorship that the barring, suspension, or shadow banning of individuals on social media is not a free speech problem. The reason is that the First Amendment applies to the government, not private parties. As a threshold matter, it is important to stress that free speech values are neither synonymous with, nor contained exclusively within, the First Amendment. The First Amendment addressed the most prevalent danger of the time in the form of direct government regulation and censorship of free speech and the free press. Yet, free speech in society is impacted by both public and private conduct. Indeed, the massive censorship system employed by social media companies presents the greatest loss of free speech in our history. These companies, not the government, now control access to the "marketplace of ideas." That is also a free speech threat that needs to be taken seriously by Congress. While the *Washington Post* has shown that the Russian trolling operations had virtually zero impact on our elections,[22] the corporate censorship of companies like Twitter and Facebook clearly had an impact by suppressing certain stories and viewpoints in our public discourse. It was the response to alleged disinformation, not the disinformation itself, that manipulated the debate and issues for voters.

The opposition to the government's involvement in a censorship system should be condemned regardless of whether it can be enjoined as a violation of the First Amendment. I will discuss that below. I would first like to address whether a constitutional violation could be established on these facts. I believe that it is possible but the value of this select subcommittee is that it can supply critical information to

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[21] *See* Luke Barr & Alexander Mallin, *FBI More Than Doubles Domestic Terrorism Investigations: Christopher Wray*, ABC NEWS, Sept. 21, 2021, https://abcnews.go.com/Politics/fbi-doubles-domestic-terrorism-investigations-christopher-wray/story?id=80145125.

[22] Tim Starks, *Russian Trolls on Twitter Had Little Influence on 2016 Election*, WASH. POST, Jan. 9, 2023, https://www.washingtonpost.com/politics/2023/01/09/russian-trolls-twitter-had-little-influence-2016-voters/.

determine whether unconstitutional actions have been taken by a variety of federal agencies.

The First Amendment addresses actions by the government and there are certainly actions taken by these agencies to censor the views of citizens. While one can debate whether social media executives became effective government agents, public employees are government agents. Their actions must not seek to abridge the freedom of speech. It is possible that a systemic government program supporting a privately-run censorship system is sufficient to justify injunctive relief based on the actions of dozens of federal employees to target and seek the suspension of citizens due to their viewpoints. However, this program can also run afoul of the First Amendment if the corporate counterparts in the system are considered effective government agents themselves. The most common example occurs under the Fourth Amendment where the government is sometimes viewed as acting through private security guards or snitches performing tasks at its request.

The same agency relationship can occur under the First Amendment, particularly on social media. The "marketplace of ideas" is now largely digital. The question is whether the private bodies engaging in censorship are acting truly independently of the government. With the Twitter Files, there is now ample reason to question that separation. Social media companies operate under statutory conditions and agency review. That relationship can allow or encourage private parties to act as willing or coerced agents in the denial of free speech. Notably, in 1946, the Court dealt with a town run by a private corporation in *Marsh v. Alabama*.[23] It was that corporation, rather than a government unit, that prevented citizens from distributing religious literature on a sidewalk. However, the Court still found that the First Amendment was violated because the corporation was acting as a governing body. The Court held that, while the denial of free speech rights "took place, [in a location] held by others than the public, [it] is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."[24]

The Congress has created a curious status for social media companies in granting immunity protections in Section 230. That status and immunity have been repeatedly threatened by members of Congress unless social media companies expanded censorship programs in a variety of different areas. The demands for censorship have been reinforced by letters threatening congressional action. Many of those threats have centered around removing Section 230 immunity, pursuing antitrust measures, or other vague regulatory responses. Many of these threats have focused on conservative sites or speakers. The language of the Section itself is problematic in giving these companies immunity "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[25] As Columbia Law professor Phil Hamburger has noted, the statute appears to permit what is

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23 Marsh v. Alabama, 326 U.S. 501 (1946).

24 *Id.* at 509.

25 47 U.S.C. § 230(c).

made impermissible under the First Amendment:[26] "Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them."[27] As Hamburger notes, that does not mean that the statute is unconstitutional, particularly given the judicial rule favoring narrow constructions to avoid unconstitutional meanings.[28] However, there is another lingering issue raised by the use of this power to carry out the clear preference on "content moderation" of one party.

The Court has recognized that private actors can be treated as agents of the government under a variety of theories. Courts have found such agency exists when the government exercises "coercive power" or "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[29] The Court has also held that the actions of a private party can be "fairly treated as that of the State itself" where there exists a "close nexus between the State and the challenged action" that a private action "may be fairly treated as that of the State itself."[30] I will return to the case law below, but first it is useful to consider what is currently known about the government-corporate coordination revealed by the Twitter Files.

A. The Twitter Files and the Government-Corporate Coordination

I will not lay out the full array of communications revealed by Twitter, but some are worth noting as illustrative of a systemic and close coordination between the company and federal officials, including dozens reportedly working within the FBI. The level of back-channel communications at one point became so overwhelming that a Twitter executive complained that the FBI was "probing & pushing everywhere." Another official referred to managing the government censorship referrals as a "monumental undertaking." At the same time, dozens of ex-FBI employees were hired, including former FBI General Counsel James Baker. There were so many FBI employees that they set up a private Slack channel and a crib sheet to allow them to translate FBI terms into Twitter terms more easily. The Twitter Files have led groups from the right and the left of our political spectrum to raise alarms over a censorship system maintained by a joint government-corporate effort.[31] Journalist Matt Taibbi was enlisted by Elon Musk to present some of these files and reduced his findings to a simple header: "Twitter, the FBI Subsidiary."

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[26] Philip Hamburger, *The Constitution Can Crack Section 230*, WALL STREET JOURNAL (Jan. 30, 2021).

[27] Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them.

[28] *Id. See, e.g., Republican Party of Hawaii v. Mink*, 474 U.S. 1301, 1302 (1985) (narrowly interpreting the recall provisions of the Honolulu City Charter).

[29] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[30] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[31] *Compare Yes, You Should be Worried About the Relationship with Twitter*, THE FIRE, Dec. 23, 2022, https://www.thefire.org/news/yes-you-should-be-worried-about-fbis-relationship-twitter *with* Branco Marcetic, *Why the Twitter Files Are In Fact a Big Deal*, JACOBIN, Dec. 29, 2022, https://jacobin.com/2022/12/twitter-files-censorship-content-moderation-intelligence-agencies-surveillance.

It is important to note that the FBI was not alone among the federal agencies in systemically targeting posters for censorship. Emails reveal FBI figures, like San Francisco Assistant Special Agent in Charge Elvis Chan, asking Twitter executives to "invite an OGA" (or "Other Government Organization") to an upcoming meeting. A week later, Stacia Cardille, a senior Twitter legal executive, indicated the OGA was the CIA, an agency under strict limits regarding domestic activities. Much of this work apparently was done through the multi-agency Foreign Influence Task Force (FITF), which operated secretly to censor citizens. Cardille referenced her "monthly (soon to be weekly) 90-minute meeting with FBI, DOJ, DHS, ODNI [Office of the Director of National Intelligence], and industry peers on election threats." She detailed long lists of tasks sent to Twitter by government officials.

Chan and Twitter's head of trust and safety Yoel Roth reportedly set up an encrypted network to allow the FBI and intelligence officials to correspond more easily and regularly. This system appears to have included other companies beyond the social media companies, including but not limited to Yahoo!, Twitch, Clouldfare, LinkedIn, and Wikimedia. It worked. The FBI was soon tagging "hundreds of problem accounts" and sharing Excel spreadsheets with Twitter. These flags included news articles deemed suspicious, including *Washington Post* articles.

The government flags show how insatiable censorship can become as FBI staff sought the removal of an ever-widening array of posts on an expanding scope of subjects. One email in August 2022 sent "long lists of newspapers, tweets or YouTube videos" deemed to be voicing "anti-Ukraine narratives." Even satirical and comedy sites reportedly were pegged by the social media police, as clear jokes were deemed worthy of censorship. One such posting jokingly urged, before the midterm elections, for Americans to "vote today, Democrats you vote Wednesday 9th." Another FBI tagged post stated "if you're not wearing a mask, I'm not counting your vote," and "for every negative comment on this post, I'm adding another vote for the democrats." The expectations of the government are evident in what Twitter officials described as calls that were "very angry in nature."

The censorship efforts reportedly included reported "regular meetings" with intelligence officials. This included an effort to warn Twitter about a "hack-and-leak operation" by state actors targeting the 2020 presidential election. That occurred just before the *New York Post* story on Hunter Biden's laptop was published and then blocked by Twitter. It was also blocked by other social media platforms like Facebook.[32]

The integrated system got to the point that the FBI was doing clear key word searches to flag large numbers of postings. On November 3, 2020, Cardille told Baker that "[t]he FBI has "some folks in the Baltimore field office and at HQ that are just doing keyword searches for violations. This is probably the 10th request I have dealt with in the last 5 days." Baker responded that it was "odd that they are searching for violations of our policies." But it was not odd at all. Twitter had integrated both current and former FBI officials into its network and the FBI was using the company's broadly defined terms of service to target a wide array of postings and posters for suspensions and deletions.

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[32] Mark Zuckerberg has also stated that the FBI clearly warned about the Hunter Biden laptop as Russian disinformation. David Molloy, *Zuckerberg Tells Rogan that FBI Warning Prompted Biden Laptop Story Censorship*, BBC, August 26, 2022, https://www.bbc.com/news/world-us-canada-62688532.

At one point, the coordination became so tight that, in July 2020, Chan offered to grant temporary top-secret clearance to Twitter executives to allow for easier communications and incorporation into the government network.[33] This close working relationship also allowed the government use of accounts covertly, reportedly with the knowledge of Twitter. One 2017 email sent by an official from United States Central Command (CENTCOM) requested that Twitter "whitelist" Arabic-language Twitter accounts that the government was using to "amplify certain messages." The government also asked that these accounts be granted the "verified" blue checkmark.

The range of available evidence on government coordination with censorship extends beyond the Twitter Files and involves other agencies. For example, recent litigation brought by various states over social media censorship revealed a back-channel exchange between defendant Carol Crawford, the CDC's Chief of digital media and a Twitter executive.[34] The timing of the request for the meeting was made on March 18, 2021. Twitter senior manager for public policy Todd O'Boyle asked Crawford to help identify tweets to be censored and emphasized that the company was "looking forward to setting up regular chats." However, Crawford said that the timing that week was "tricky." Notably, that week, Dorsey and other CEOs were to appear at a House hearing to discuss "misinformation" on social media and their "content moderation" policies. I had just testified on private censorship in circumventing the First Amendment as a type of censorship by surrogate.[35] Dorsey and the other CEOs were asked at the March 25, 2021, hearing about my warning of a "little brother problem, a problem which private entities do for the government which it cannot legally do for itself."[36] Dorsey insisted that there was no such censorship office or program.

The pressure to censor Covid-related views was also coming from the White House, as they targeted Alex Berenson, a former *New York Times* reporter, who had contested officials positions on vaccines and underlying research. Rather than push information to counter Berenson's views, the White House wanted him banned. Berenson was eventually suspended.

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[33] Gadde and Roth have both testified that they do not know if anyone took up this offer for clearances.

[34] The lawsuit addresses how experts, including Drs. Jayanta Bhattacharya (Stanford University) and Martin Kulldorff (Harvard University), have faced censorship on these platforms. Those doctors were the co-authors of the Great Barrington Declaration, which advocated for a more focused Covid response that targeted the most vulnerable population rather than widespread lockdowns and mandates. Many are now questioning the efficacy and cost of the massive lockdown as well as the real value of masks or the rejection of natural immunities as an alternative to vaccination. Yet, these experts and others were attacked for such views just a year ago. Some found themselves censored on social media for challenging claims of the CDC and figures like Dr. Anthony Fauci. None of these views are inviolate or beyond question – any more than the official accounts were at the time. Rather, they were systemically removed from social media – pushed to the far extremes of public and academic discourse. There is every reason for the CDC to combat what it considers false information through its own postings and outreach programs. However, the involvement in censoring dissenting views is deeply troubling.

[35] *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Commc'n & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. (2021) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School)

[36] *Misinformation and Disinformation on Online Platforms*: *Hearing Before the Subcomm. on Commc'n & Tech. and Subcomm. on Consumer Protection of the H. Comm. on Energy & Com.,* 117th Cong. (2021).

These files show not just a massive censorship system but a coordination and integration of the government to a degree that few imagined before the release of the Twitter Files. Again, it is important to emphasize what we do not know. We still do not know the full extent of this coordination, even at Twitter. It is also important to address one added allegation that emerged from these files: the FBI paid Twitter millions for censorship. That allegation is not supported by the facts that are currently known. Twitter did confirm that millions of dollars were paid to Twitter by the FBI. Some have suggested that this constituted direct payment for censorship. This is based on an email to the former Deputy General Counsel (and former FBI General Counsel) Jim Baker revealing that Twitter collected $3,415,323 from the FBI:

> Jim, FYI, in 2019 SCALE instituted a reimbursement program for our legal process response from the FBI. Prior to the start of the program, Twitter chose not to collect under this statutory right of reimbursement for the time spent processing requests from the FBI. I am happy to report we have collected $3,415,323 since October 2019! This money is used by LP for things like the TTR and other LE-related projects (LE training, tooling, etc.).

That email led some to say that it establishes a "cash for censorship" arrangement. However, that email appears to refer to a reimbursement program for actions and disclosures under the Stored Communications Act, 18 U.S.C. §2706. This investigation may shed more light on those payments but the assumption is that they were not compensation for removed or banned users. However, it does show that the overall working relationship with the FBI had a financial component.

Twitter's owner and associates now says that its staff worked as agents of the government and largely carried out the censorship requested by the FBI and other agencies. So, the company itself has admitted that there was a problematic agency relationship that existed with the government. The question is whether such a relationship also existed with companies like Facebook, which have resisted the same level of transparency as Twitter.

B. Coercion or Consent: The Line Between Allies and Agents Under the First Amendment

The line between consent and coercion can admittedly be a difficult one to discern in many cases. There is an argument that this is a violation of the First Amendment. Where the earlier debate over the status of these companies under Section 230 remained mired in speculation, the recent disclosures of government involvement in the Twitter censorship program presents a more compelling and concrete case for arguing agency theories. These emails refer to multiple agencies with dozens of employees actively coordinating the blacklisting and blocking of citizens due to their public statements. There is no question that the United States government is actively involved in a massive censorship system. The only question is whether it is in violation of the First Amendment.

Once again, the Twitter Files show direct action from federal employees to censor viewpoints and individual speakers on social media. The government conduct is direct and clear. That may alone be sufficient to satisfy courts that a program or policy abridges free

speech under the First Amendment. Even if a company like Twitter declined occasionally, the federal government was actively seeking to silence citizens. Any declinations only show that that effort was not always successful.

In addition to that direct action, the government may also be responsible for the actions of third parties who are partnering with the government on censorship. The government has long attempted to use private parties to evade direct limits imposed by the Constitution. Indeed, this tactic has been part of some of the worst chapters in our history. For example, in *Lombard v. Louisiana*,[37] the Supreme Court dealt with the denial of a restaurant to serve three black students and one white student at a lunch counter in New Orleans reserved for white people. The Court acknowledged that there was no state statute or city ordinance requiring racial segregation in restaurants. However, both the Mayor and the Superintendent of Police had made public statements that "sit-in demonstrations" would not be permitted. The Court held that the government cannot do indirectly what it cannot do directly. In other words, it "cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."[38]

As the Court said in *Blum v. Yaretsky* (where state action was not found), "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[39] Past cases (often dealing with state action under the Fourteenth Amendment) have produced different tests for establishing an agency relationship, including (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.[40] Courts have noted that these cases "overlap" in critical respects.[41] I will not go into each of these tests but the show the highly contextual analysis performed by courts in finding private conduct taken at the behest or direction of the government. The Twitter Files show a multilayered incorporation of government information, access, and personnel in the censorship program. One question is "whether the state has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity."[42] Nevertheless, the Supreme Court noted in *Blum* that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives."[43]

Courts have previously rejected claims of agency by private parties over social media.[44] However, these cases often cited that lack of evidence of coordination and occurred before the release of the Twitter Files. For example, in *Rogalinski v. Meta*

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37 373 U.S. 267 (1963).

38 *Id.* at 273.

39 Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982).

40 Pasadena Republican Club v. W. Justice Ctr., 985 F.3d 1161, 1167 (9th Cir. 2021); Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003). Some courts reduce this to three tests.

41 Rogalinski v. Meta Platforms, Inc., 2022 U.S. Dist. LEXIS 142721 (August 9, 2022).

42 Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503, 507 (9th Cir. 1989).

43 *Blum*, 457 U.S. at 1004-05.

44 O'Handley v. Padilla, 579 F. Supp.3d 1163 1192-93 (N.D. Cal. 2022).

Platforms, Inc.,[45] the court rejected a claim that Meta Platforms, Inc. violated the First Amendment when it censored posts about COVID-19. However, the claim was based entirely on a statement by the White House Press Secretary and "all of the alleged censorship against Rogalinski occurred before any government statement." It noted that there was no evidence that there was any input of the government to challenge the assertion that Meta's message was "entirely its own."[46]

There is an interesting comparison to the decision of the United States Court of Appeals for the Sixth Circuit in *Paige v. Coyner*, where the Court dealt with the termination of an employee after a county official called her employer to complain about comments made in a public hearing.[47] The court recognized that "[t]his so-called state-actor requirement becomes particularly complicated in cases such as the present one where a private party is involved in inflicting the alleged injury on the plaintiff."[48] However, in reversing the lower court, it still found state action due to the fact that a government official made the call to the employer, which prompted the termination.

Likewise, in *Dossett v. First State Bank*, the United States Court of Appeals for the Eighth Circuit ruled that the termination of a bank employee was the result of state action after school board members contacted her employer about comments made at a public-school board meeting.[49] The Eighth Circuit ruled that the district court erred by instructing a jury that it had to find that the school board members had "actual authority" to make these calls. In this free speech case, the court held that you could have state action under the color of law when the "school official who was purporting to act in the performance of official duties but was acting outside what a reasonable person would believe the school official was authorized to do."[50] In this case, federal officials are clearly acting in their official capacity. Indeed, that official capacity is part of the concern raised by the Twitter Files: the assignment of dozens of federal employees to support a massive censorship system.

Courts have also ruled that there is state action where government officials use their positions to intimidate or pressure private parties to limit free speech. In *National Rifle Association v. Vullo*, the United States Court of Appeals for the Second Circuit ruled that a free speech claim could be made on the basis of a state official's pressuring companies not to do business with the NRA.[51] The Second Circuit held "although government officials are free to advocate for (or against) certain viewpoints, they may not encourage suppression of protected speech in a manner that 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.'"[52] It is also important to note that pressure is not required to establish an agency relationship under three of the prior tests. It can be based on consent rather than coercion.

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45 2022 U.S. Dist. LEXIS 142721 (August 9, 2022).

46 *Id*.

47 Paige v. Coyner, 614 F.3d 273, 276 (6th Cir. 2010).

48 *Id.*

49 399 F.3d 940 (8th Cir. 2005).

50 *Id*. at 948.

51 National Rifle Association of America v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022).

52 *Id.* (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)).

The Twitter Files show FBI officials warning Twitter executives that their platform was being targeted by foreign powers, including a warning that an executive cited as a basis for blocking postings related to the Hunter Biden laptop. At the same time, various members of Congress have warned social media companies that they could face legislative action if they did not continue to censor social media. Indeed, after Twitter began to reinstate free speech protections and dismantle its censorship program, Rep. Schiff (joined by Reps. André Carson (D-Ind.), Kathy Castor (D-Fla.) and Sen. Sheldon Whitehouse (D-R.I.)) sent a letter to Facebook, warning it not to relax its censorship efforts. The letter reminded Facebook that some lawmakers are watching the company "as part of our ongoing oversight efforts" — and suggested they may be forced to exercise that oversight into any move by Facebook to "alter or rollback certain misinformation policies." This is only the latest such warning. In prior hearings, social media executives were repeatedly told that a failure to remove viewpoints were considered "disinformation." For example, in a November 2020 Senate hearing, then-Twitter CEO Jack Dorsey apologized for censoring the Hunter Biden laptop story. But Sen. Richard Blumenthal, D-Conn., warned that he and his Senate colleagues would not tolerate any "backsliding or retrenching" by "failing to take action against dangerous disinformation."[53] Senators demands increased censorship in areas ranging from the pandemic to elections to climate change.

These warnings do not necessarily mean that a court would find that executives were carrying out government priorities. An investigation is needed to fully understand the coordination and the communications between the government and these companies. In *Brentwood Academy v. Tennessee Secondary School Athletic Assn*.,[54] the Supreme Court noted that state action decisions involving such private actors are highly case specific:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government…
>
> Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," …when the State provides "significant encouragement, either overt or covert," … or when a private actor operates as a 'willful participant in joint activity with the State or its agents," … We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," … when it has been delegated a public

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53 *Misinformation and Disinformation on Online Platforms*: *Hearing Before the Subcomm. on Commc'n & Tech. and Subcomm. on Consumer Protection of the H. Comm. on Energy & Com.,* 117th Cong. (2021).

54 531 U.S. 288 (2001).

> function by the State, … when it is "entwined with governmental policies," or when government is "entwined in [its] management or control."[55]

Obviously, many of these elements appear present. However, the Twitter Files also show executives occasionally declining to ban posters targeted by the government. It also shows such pressure coming from the legislative branch. For example, the Twitter Files reveal that Twitter refused to carry out censorship requests from at least one member of this Committee targeting a columnist and critic. Twitter declined and one of its employees simply wrote, "no, this isn't feasible/we don't do this."[56] There were also requests from Republicans to Twitter for action against posters, including allegedly one from the Trump White House to take down content.[57]

We simply do not know the extent to what Twitter "did do" and for whom. We do not know how demands were declined when flagged by the FBI. The report from Twitter reviewers selected by Elon Musk suggests that most requests coming from the Executive Branch were granted. That is one of the areas that could be illuminated by this select subcommittee. The investigation may be able to supply the first comprehensive record of the government efforts to use these companies to censor speech. It can pull back the curtain on America's censorship system so that both Congress and the public can judge the conduct of our government.

C. Outsourcing Censorship: Why Congressional Action is Warranted

Whether the surrogate censorship conducted by social media companies is a form of government action may be addressed by the courts in the coming years. However, certain facts are well-established and warrant congressional action. First, while these companies and government officials prefer to call it "content moderation," these companies have carried out the largest censorship system in history, effectively governing the speech of billions of people. The American Civil Liberties Union, for example, maintains that censorship applies to both government and private actions. It is defined as "the suppression of words, images, or ideas that are 'offensive,' [and] happens whenever some people succeed in imposing their personal political or moral values on

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55 *Id.* at 296.

56 Jonathan Turley, "*We Don't Do This": Twitter Censors Rejected Adam Schiff's Censorship Request*, THE HILL, Jan. 5, 2023, https://thehill.com/opinion/judiciary/3800380-we-dont-do-this-even-twitters-censors-rejected-adam-schiffs-censorship-request/.

57 This included the Trump White House allegedly asking to take down derogatory tweets from the wife of John Legend after the former president attacked the couple. This allegation was raised at the hearing held yesterday. Moreover, some Trump officials supported efforts to combat foreign interference and false information on social media. Finally, it was reported this week that Twitter has a "database" of Republican demands. Adam Rawnsley and Asawin Suebaeny, *Twitter Kept Entire "Database" of Republican Requests to Censor Posts*, ROLLING STONE, Feb. 8, 2023, https://www.rollingstone.com/politics/politics-news/elon-trump-twitter-files-collusion-biden-censorship-1234675969/.

others."[58] Adopting Orwellian alternative terminology does not alter the fact that these companies are engaging in the systemic censoring of viewpoints on social media.

Second, the government admits that it has supported this massive censorship system. Even if the censorship is not deemed government action for the purposes of the First Amendment, it is now clear that the United States government has actively supported and assisted in the censorship of citizens. Objecting that the conduct of government officials may not qualify under the First Amendment does not answer the question of whether members believe that the government should be working for the censorship of opposing or dissenting viewpoints. During the McCarthy period, the government pushed blacklists for suspected communists and the term "fellow travelers" was rightfully denounced regardless of whether it qualified as a violation of the First Amendment. Even before Eugene McCarthy launched his un-American activities hearings, the Justice Department created an effective blacklist of organizations called "Attorney General's List of Subversive Organizations" (AGLOSO) that was then widely distributed to the media and the public. It became the foundation for individual blacklists.[59] The maintenance of the list fell to the FBI. Ultimately, blacklisting became the norm with both legislative and executive officials tagging artists, writers, and others. As Professor Geoffrey Stone observed, "Government at all levels hunted down 'disloyal' individuals and denounced them. Anyone so stigmatized became a liability to his friends and an outcast to society."[60] At the time, those who raised the same free speech objections were also attacked as "fellow travelers" or "apologists" for communists. It was wrong then and remains wrong now. It was an affront to free speech values that have long been at the core of our country. It is not enough to say that the government is merely seeking the censorship of posters like any other user. There are many things that are more menacing when done by the government rather than individuals. Moreover, the government is seeking to silence certain speakers in our collective name and using tax dollars to do so. The FBI and other agencies have massive powers and resources to amplify censorship efforts. The question is whether Congress and its individual members support censorship whether carried out by corporate or government officials on social media platforms.[61]

Third, the government is engaged in targeting users under the ambiguous mandates of combating disinformation or misinformation. These are not areas traditionally addressed by public affairs offices to correct false or misleading statements made about an agency's work. The courts have repeatedly said that agencies are allowed

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[58] American Civil Liberties Union, *What is Censorship?*, https://www.aclu.org/other/what-censorship.

[59] Robert Justin Goldstein, *Prelude to McCarthyism*, PROLOGUE MAGAZINE, Fall 2006, https://www.archives.gov/publications/prologue/2006/fall/agloso.html. Courts pushed back on the listing to require some due process for those listed.

[60] Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1400 (2005).

[61] The distinction between these companies from other corporate entities like the NFL or Starbucks is important. There is no question that businesses can limit speech on their premises and by their own employees. However, these companies constitute the most popular communication platforms in the country. They are closer to AT&T than Starbucks in offering a system of communication.

to speak in their voices without viewpoint neutrality.[62] As the Second Circuit stated, "[w]hen it acts as a speaker, the government is entitled to favor certain views over others."[63] This was an effort to secretly silence others. Courts have emphasized that "[i]t is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech."[64] These public employees were deployed to monitor and target user spreading "disinformation" on a variety of subjects, from election fraud to government corruption. The Twitter Files show how this mandate led to an array of abuses from targeting jokes to barring opposing scientific views.

These facts already warrant bipartisan action from Congress. Free speech advocates have long opposed disinformation mandates as an excuse or invitation for public or private censorship. I admittedly subscribe to the view that the solution to bad speech is better speech, not speech regulation.[65] Justice Brandeis embraced the view of the Framers that free speech was its own protection against false statements: "If there be time to discover through discussion the falsehood and the fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech not enforced silence."[66] We have already seen how disinformation was used to silence dissenting views of subjects like mask efficacy and Covid policies like school closures that are now being recognized as legitimate.

We have also seen how claims of Russian trolling operations may have been overblown in their size or their impact. Indeed, even some Twitter officials ultimately concluded that the FBI was pushing exaggerated claims of foreign influence on social media.[67] The Twitter Files refer to sharp messages from the FBI when Twitter failed to find evidence supporting the widely reported foreign trolling operations. One Twitter official referred to finding "no links to Russia." This was not for want of trying. Spurred on by the FBI, another official promised "I can brainstorm with [redacted] and see if we can dig even deeper and try to find a stronger connection." The pressure from the FBI led Roth to tell his colleagues that he was "not comfortable" with the agenda of the FBI and said that it reminded him of something "more like something we'd get from a congressional committee than the Bureau." They did not succeed in confirming the evidence demanded by the FBI, though the results of these searches were not made public until the release of the Twitter Files.

The Twitter Files tragically reaffirm why the last agency that you want to combat disinformation generally is a law enforcement body like the FBI. This is an agency with

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62 Pleasant Grove City v. Summum, 555 U.S. 460, 467-68 (2009); Johanns v. Livestock Mktg.Ass'n, 544 U.S. 550, 553 (2005).

63 Wandering Dago, Inc. v. Destito, 879 F.3d 20, 34 (2d Cir. 2018).

64 Zieper v. Metzinger, 474 F.3d 60, 65 (2d Cir. 2007).

65 *See generally* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y 571 (2022).

66 *Whitney*, 274 U.S. at 375, 377.

67 In his testimony yesterday, Roth stated that they found substantial Russian interference impacting the election. *Protecting Speech from Government Interference and Social Media Bias, Part 1: Twitter's Role in Suppressing the Biden Laptop Story: Hearing Before the H. Comm. on Oversight & Accountability*, 118th Cong. (2023) (statement of Yael Roth, Former Head of Trust and Safety, Twitter). That claim stands in conflict with other studies and reports, but it can also be addressed as part of the investigation into these communications.

overwhelming powers used to combat terrorists and criminal actors. One area of inquiry is how these dozens of government monitors were rated or rewarded for their work. Twitter Files reveal the government targeting thousands of postings in what appeared key work searches. The measure of a program to combat disinformation is likely the number of postings that you succeeded in having removed. That can create a dangerous type of piece work evaluations for free speech curtailment.

The use of an agency with subpoena powers and national security powers obviously adds a chilling effect for companies asked to carry out censorship. That is magnified with the addition of foreign intelligence agencies like the CIA. The Twitter Files refer to Cybersecurity and Infrastructure Security Agency's (CISA) participation in these coordination meetings. CISA shows the mission of agencies creeping into speech regulation. Given a mandate to help protect election integrity, CISA plunged into the monitoring and targeting of those accused of disinformation. Infrastructure was interpreted to include speech. As its director, Jen Easterly, declared "the most critical infrastructure is our cognitive infrastructure" and thus included "building that resilience to misinformation and disinformation, I think, is incredibly important."[68] She pledged to continue that work with the private sector, including social media companies, on that effort. We do not need the government in the business of building our "cognitive infrastructure." Like content moderation, the use of this euphemism does not disguise the government's effort to direct and control what citizens may read or say on public platforms.

The danger of censorship is not solely a concern of one party. To his great credit, Rep. Ro Khanna (D., Cal.) in October 2020, said that he was appalled by the censorship and was alarmed by the apparent "violation of the 1st Amendment principles."[69] Congress can bar the use of federal funds for such disinformation offices. Such legislation can require detailed reporting on agency efforts to ban or block public comments or speech by citizens. Even James Baker told the House Oversight Committee yesterday that there may be a need to pass legislation to limit the role of government officials in their dealings with social media companies.[70] Legislation can protect the legitimate role of agencies in responding and disproving statements made out of its own programs or policies. It is censorship, not disinformation, that has damaged our nation in recent years. Free speech, like sunshine, can be its own disinfectant. In *Terminiello v. City of Chicago*, the Supreme Court declared that:

> The right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes . . . [A] function of free speech under our system of government is to invite dispute. . . . Speech is

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[68] Maggie Miller, *Cyber Agency Beefing Up Disinformation, Misinformation Team*, THE HILL, Nov. 10, 2022, https://thehill.com/policy/cybersecurity/580990-cyber-agency-beefing-up-disinformation-misinformation-team/.

[69] *Democratic Rep. Ro Khana Expressed Concerns Over Twitter's Censorship of Hunter Biden Laptop*, FOX NEWS, Dec. 2, 2022, https://www.foxnews.com/politics/democratic-rep-ro-khanna-expressed-concerns-twitters-censorship-hunter-biden-laptop-story.

[70] *Protecting Speech from Government Interference and Social Media Bias, Part 1: Twitter's Role in Suppressing the Biden Laptop Story: Hearing Before the H. Comm. on Oversight & Accountability*, 118th Cong. (2023) (statement of James Baker, Former General Counsel, FBI.

> often provocative and challenging. . . [F]reedom of speech, though not absolute, is nevertheless protected against censorship.[71]

Disinformation does cause divisions, but the solution is not to embrace government-corporate censorship. The government effort to reduce speech does not solve the problem of disinformation. It does not change minds but simply silences voices in national debates.

IV. CONCLUSION

The recent disclosures of the extensive coordination between Twitter and the federal government on censorship show how the desire to control speech in society rests like a dormant virus in our system. It takes little accommodation or access for the government to pour into the breach. The Twitter Files show how quickly the government used its access to target a wider and wider range of subjects and posters. However, if that disclosure had a chilling impact on many of us, the impact of the FBI's response to the criticism was perfectly glacial. When some critics denounced it as raw censorship, the FBI accused them of being "conspiracy theorists … feeding the American public misinformation."[72] So, criticism of the FBI's work to censor citizens resulted in an official statement denouncing those citizens. Having an agency both push for censorship and denounce critics is a particularly dangerous combination, particularly when that agency is our largest law enforcement body.

None of these denials or attacks succeed, however. The public understands the threat and strongly supports an investigation into the FBI's role in censoring social media. Despite the push for censorship by some politicians and pundits, most Americans still want free-speech protections. It is in our DNA. This country was founded on deep commitments to free speech and limited government – and that constitutional tradition is no conspiracy theory. Polls show that 73% of Americans believe that these companies censored material for political purposes.[73] Another poll showed that 63% want an investigation into FBI censorship allegations.[74]

Adlai Stevenson famously warned of this danger: "Public confidence in the integrity of the Government is indispensable to faith in democracy; and when we lose faith in the system, we have lost faith in everything we fight . . . for." Senator Stevenson's words should resonate on both sides of our political divide and that we might, even now, find a common ground and common purpose. The loss of faith in our government and the independence of the FBI creates political instabilities and vulnerabilities in our system. Moreover, regardless of party affiliation, we should all want answers to come of these questions. We can differ on our conclusions, but the first step

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71 Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (citations omitted).

72 Victor Nava, F*BI Blasts "Conspiracy Theorists Over Twitter Files*, NY Post, Dec. 21, 2022.

73 Sean Burch, *Nearly 75% of Americans Believe Twitter, Facebook Censor Posts Based on Viewpoints, Pew Finds*, THE WRAP, Aug. 19, 2020, https://www.thewrap.com/nearly-75-percent-twitter-facebook-censor/.

74 *63% Want FBI's Social Media Activity Investigated*, RASMUSSEN REPORTS, Dec. 26, 2022, https://www.rasmussenreports.com/public_content/politics/partner_surveys/twittergate_63_want_fbi_s_social_media_activity_investigated.

for Congress is to force greater transparency on controversies involving bias to censorship. One of the greatest values of oversight is to allow greater public understanding of the facts behind government actions. Greater transparency is the only course that can help resolve the doubts that many have over the motivations and actions of their government. I remain an optimist that it is still possible to have a civil and constructive discussion of these issues. Regardless of our political affiliations and differences, everyone in this room is here because of a deep love and commitment to this country. It was what brought us from vastly different backgrounds and areas in our country. We share a single article of faith in our Constitution and the values that it represents. We are witnessing a crisis of faith today that must be healed for the good of our entire nation. The first step toward that healing is an open and civil discussion of the concerns that the public has with our government. We can debate what measures are warranted in light of any censorship conducted with government assistance. However, we first need to get a full and complete understanding of the relationship between federal agencies and these companies in the removal or suspension of individuals from social media. At a minimum, that should be a position that both parties can support in the full disclosure of past government conduct and communications with these companies.

Once again, thank you for the honor of appearing before you to discuss these important issues, and I would be happy to answer any questions from the Committee.

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